UNITED STATES
v.
SOUTHERN PACIFIC TRANSPORTATION CO.
AND DONALD K. LEE

IBLA 82-351 Decided August 13, 1982

Appeal from decision of Administrative Law Judge E. Kendall Clarke rejecting patent application for railroad grant lands. CA 2709.

Affirmed.

1. Mineral Lands: Determination of Character of--Railroad Grant Lands

To establish the mineral character of railroad grant lands under the Act of July 1, 1862, 12 Stat. 489 as amended by the Act of July 2, 1864, 13 Stat. 356, it must be shown that known conditions--which may include geological conditions, discoveries of minerals in adjacent land, and other observable external conditions upon which prudent and experienced men are known to be accustomed to act--are such as reasonably to engender the belief that the land contains mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end.

2. Mineral Lands: Determination of Character of--Railroad Grant Lands

One will not be considered an innocent purchaser for value under section 321(b) of the Transportation Act of 1940, 49 U.S.C. § 65(b) (1976), when the evidence presented at a hearing supports a finding that the lands in question were of known mineral character on the date of the original sale by the railroad, and the purchaser should have known at the time of purchase that such lands were excepted from the grant to the railroad.

APPEARANCES: Victor L. Huber, Esq., Grass Valley, California, for appellants; Burton J. Stanley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The Southern Pacific Transportation Company (Southern Pacific) and Donald K. Lee have appealed from a decision of Administrative Law Judge E. Kendall Clarke, dated December 4, 1981, rejecting a patent application for 89 acres of railroad grant lands situated in sec. 9, T. 15 N., R. 10 E., Mount Diablo meridian, Placer County, California. The patent application was filed in 1975 by Southern Pacific, as successor in interest to the Central Pacific Railroad Company (Central Pacific), on behalf of the real party in interest, appellant Donald K. Lee, pursuant to section 321(b) of the Transportation Act of 1940, 49 U.S.C. § 65(b) (1976). 1/ Section 321(b) of the Transportation Act of 1940, supra, preserved existing Departmental authority under section 5 of the Act of March 3, 1887, 43 U.S.C. § 898 (1976), to issue patents to innocent purchasers for value of mineral lands from railroads. See Laden v. Andrus, 595 F.2d 482, 485 n.3 (9th Cir. 1979), aff'g, Southern Pacific Co., Heirs of George H. Wedekind, 20 IBLA 365 (1975).

The land in question was originally granted to Central Pacific, pursuant to the Act of July 1, 1862, 12 Stat. 489, 492, and the Act of July 2, 1864, 13 Stat. 356, 358. Mineral lands were excluded from the operation of those acts. Central Pacific located its line on October 27, 1866. On October 4, 1888, Central Pacific sold the land to F. A. Birce, appellant Lee's predecessor in interest.

On March 25, 1980, the Bureau of Land Management (BLM), filed a contest complaint seeking to cancel the railroad patent application, charging:

> A. The lands described in allegation 3 were mineral in character at all times relevant herein and specifically on or before October 4, 1888, the date of sale by the Central Pacific Railroad Company to F. A. Birce.
>
> B. The lands described in allegation 3 were known to be mineral in character by the purchaser of the land from the Central Pacific Railroad Company, F. A. Birce, on October 4, 1888, and F. A. Birce was not an innocent purchaser for value within the meaning of Section 321(b), Part II, Title III, of the Transportation Act of September 18, 1940 (54 Stat. 954).

Judge Clarke held a hearing on March 25, 1981, in Sacramento, California.

In his December 1981 decision, Judge Clarke concluded that, based on evidence adduced at the hearing, the land in question was mineral in character and that Birce was not an innocent purchaser for value of the land. Accordingly, Judge Clarke rejected the railroad patent application.

1/ Section 321(b) of the Transportation Act of 1940, was repealed by section 4 of the Act of Oct. 17, 1978, P.L. 95-473, 92 Stat. 1466 (1978).

There are two issues for examination on appeal--the mineral character of the land and the bona fides of the purchaser. The critical date for determination of both is October 4, 1888, the date of Birce's purchase from the railroad. See Laden v. Andrus, supra at 489; Southern Pacific Co., 71 I.D. 224, 232 (1964). Even if it is established that the land was mineral in character on the date of purchase, and thus excepted from the grant to the the railroad, appellants may prevail if they can establish that Birce was an "innocent purchaser for value." See Southern Pacific Co., supra.

[1] We will first examine the mineral in character question. Appellant argues that the Government failed to establish a prima facie case on this issue, and that the Administrative Law Judge erred in interpreting the evidence on this issue. Thus, we will closely examine the evidence presented.

Land is considered to be mineral in character where

> known conditions are such as reasonably to engender the belief that the land contains mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end. Such belief may be predicated upon geological conditions, discoveries of minerals in adjacent land and other observable external conditions upon which prudent and experienced men are shown to be accustomed to act.

Southern Pacific Co., supra at 233. See United States v. Southern Pacific Co., 251 U.S. 1, 14 (1919); Diamond Coal & Coke Co. v. United States, 233 U.S. 236 (1914).

The initial burden of establishing a prima facie case that the land was mineral in character rests with the Government; however, the ultimate burden of persuasion rests with the applicant to prove by a preponderance of the evidence that the land was not mineral in character. United States v. Tobiassen, 10 IBLA 379, 384 (1973).

The Government relies on the testimony of Louis Gonzalez, a former BLM mineral examiner, who testified that the land in question was mineral in character at all times between the date the railroad line was definitely fixed and the date of purchase by Birce (Tr. 59). His conclusion was based on a number of facts.

The land is situated in the central portion of the Gold Run Mining District (Tr. 18, Exh. 3). A copy of a "Geological Map After Lindgren (1900) of the Area Around Gold Run in Placer and Nevada Counties" indicates that the land in question is situated within an area underlain by auriferous (gold-bearing) gravels (Tr. 23, Exh. 6). This auriferous gravel extends through significant portions of the Gold Run Mining District (Exhs. 3, 6). That district contains a huge trench almost a mile wide and up to 500 feet deep that runs north-south through the district. The trench was created by hydraulic mining (Tr. 25-26). Hydraulic mining was curtailed by court order in 1884 (Tr. 27).

In a mineral report dated October 26, 1979, prepared by Gonzalez, he described the mining history of the Gold Run Mining District. He characterized it as "the site of extensive hydraulic and underground mining operations" (Exh. 5 at 2). In 1970, in a bulletin of the California Division of Mines and Geology entitled Gold Districts of California, William B. Clark stated that gold production was approximately $6 million between 1865 and 1878 (Exh. 5 at 9). In 1936 in a report of the California Division of Mines entitled Gold Mines of Placer County, Gold Run District, C. A. Logan calculated that 128 million cubic yards of gravel had been mined and that reserves of between 46 and 92 million cubic yards remained (Exh. 5 at 9). At the Indiana Hill underground mine, Lindgren reports, in 1911 in a Geological Survey paper entitled Tertiary Gravels of the Sierra Nevada, that the yield was at the rate of $9 per cubic yard between 1872 and 1874 (Exh. 5 at 10). The Indiana Hill mine was situated approximately "a mile and a half" south-southeast of the land in question (Tr. 28).

In 1880 in a book entitled The Auriferous Gravels of the Sierra Nevada of California, J. D. Whitney makes reference to the "Cedar and Sherman claims," which in 1874 were contemplated as being extensively mined (Exh. 5 at 10). The claims were owned by the Gold Run Hydraulic Mining Co., Ltd. A prospecting shaft had indicated values of $232 per cubic yard at bedrock (Exh. 5 at 10).

On May 25, 1880, the assets of the Gold Run Hydraulic Mining Co., Ltd., were conveyed to the New Gold Run Co., Ltd. Those assets included mining claims described in the instrument of conveyance, as follows:

> [T]hat certain piece and parcel of mining ground known as the Sherman Company's claims lying and being situated in the Gold Run Mining District * * * and more particularly described and bounded as follows on the North by Potato Ravine on the West by the claims at present belonging to the South Yuba Canal Company on the South by the Albion Company claims and on the East by the claims of the Gold Run Hydraulic Mining Company Limited.

(Exh. 7 at 4). The assets also included one other set of mining claims, known as the "Cedar Company's Hydraulic Mining Claims," whose southwest corner is "also a corner of the Sherman Company's ground or mining claims" (Exh. 7 at 4). A mineral survey plat of the "North Star Placer Mine," dated August 7, 1873, prepared by the Surveyor General's Office of the State of California, indicates that the "Sherman Claim" and "Cedar Claim" lie side by side in sec. 9, T. 15 N., R. 10 E., Mount Diablo meridian, Placer County, California, south of the Potato Ravine (Exh. 8). Gonzalez concluded that the "Sherman claim" overlapped the northern portion of the land in question (Tr. 35-6, Exh. 8).

From a personal observation of the land in question, the Government mineral examiner concluded that there was, indeed, visible evidence of past mining operations in certain areas (Tr. 13, Exh. 4). This evidence was the high bluffs, described as "the hydraulic face--remaining hydraulic face after a hundred years," which were caused by hydraulic mining (Tr. 41-2). He stated

that the land in question could be divided into three segments. One is the part that was mined, another is the bluffs, and the other is a flat forested area above the bluffs. He believed the bluffs, which are 300 feet high, were created by hydraulic mining (Tr. 43).

In 1885 Central Pacific applied for a patent to include the land in question (Tr. 53). On May 4, 1896, the patent application was rejected and the tract book indicates that the land was described as "mineral" and states "list ordered cancelled to extent of mineral," presumably referring to cancellation of that extent of the original railroad grant (Tr. 52-3, Exh. 12).

Gonzalez also took several samples from gravel remaining in bluffs on the land, reporting the presence of gold colors (Tr. 57). No attempt was made to determine the value per cubic yard of gravel (Tr. 74). Rather, relying on a value per cubic yard (8 cents) determined by mineral examiners in 1872 as the lowest value for two mines "operating in the area," Gonzalez calculated past production and present reserves (Exh. 5 at 15-17). The value per cubic yard of 8 cents was based on a value of $20.67 per ounce of gold. The average depth of the gravel was estimated to be between 30 and 53 yards. In addition, Gonzalez determined that 25 percent of the land had been hydraulically mined in the past (Exh. 5 at 16). Using a value of 8 cents per cubic yard and estimates of the number of cubic yards on the land in question, Gonzalez set past production at 22,090 ounces of gold, or $456,606 and present reserves at 37,343 ounces of gold, or $771,883 (Exh. 5 at 16-17).

We agree with the Administrative Law Judge that the Government presented a prima facie case that the land in question was mineral in character between the date the railroad line was definitely fixed (1866) and the date of purchase by Birce (1888). The 1900 map by Lindgren indicates that the area was underlain by auriferous gravels, which also covered significant portions of the Gold Run Mining District. Past mining activity in the general vicinity indicates that these auriferous gravels contained significant values of gold which clearly "would render their extraction profitable and justify expenditures to that end." See Southern Pacific Co., supra at 233. Furthermore, part of the land involved in this patent application had been the site of past mining activity. Finally, in 1896, the Department canceled a patent application which included the lands in question because the land contained minerals. In view of the fact that the determination was fairly contemporaneous with the date of purchase (October 4, 1888), it is entitled to great weight.

Appellants rely on the testimony of Charles H. Schultz, a mining geologist and engineer, who testified that he had observed no evidence of past mining operations on the land in question (Tr. 103). Rather, he observed such evidence on adjacent property to the east (Tr. 103). He represents this on an east-west diagrammatic sketch, or cross-section, of a portion of the area (Exh. D). The sketch indicates a channel, "an erosional cut" relatively close to bedrock, where gold naturally concentrated (Tr. 108). The channel itself was not on the land in question (Exh. D). This area was hydraulically mined (Tr. 108). However, Schultz was unable to determine whether the slope of the channel, portrayed in his sketch within the land in question, was itself hydraulically mined or, rather, the result of the

sloughing of the land due to hydraulic mining at the base of the slope (Tr. 109, 138). He did admit that the high bluffs on the land in question were "characteristic" of hydraulic mining (Tr. 149).

In addition, Schultz took three samples from the land in question, one grab sample from the eastern slope and two auger samples from the top of the bluff. There was no indication of gold in any of the samples (Tr. 104).

Appellants submitted an affidavit signed by J. F. Siegfried, a consulting engineer, dated December 10, 1973, in which he stated that he examined the land in question and determined that it was nonmineral in character (Exh. A). He acknowledged that a "small portion" of the land had been hydraulically mined, "probably before 1880" (Exh. A at 1-2).

Schultz stated that his conclusions were based on his examination of the property and his reading of the Siegfried affidavit (Tr. 129). He did no historical research.

Finally, appellants presented the testimony of appellant Lee that areas adjacent and to the west of the land in question were patented as nonmineral lands (Tr. 152-3, Exh. C). Two parcels of land were patented to the railroad in 1896, one of which confirmed a portion of the October 4, 1888, deed to Birce (Tr. 152-3). Several other parcels were patented as nonmineral lands (Tr. 153).

We conclude on the issue of the mineral character of the land that the appellants have not overcome the Government's prima facie case by a preponderance of the evidence. Appellants have done little to challenge the factors which support the Government's prima facie case. The issuance of nonmineral patents for areas adjacent to the land in question is not conclusive. As pointed out by Gonzalez, it is possible that those patent applications were not contested (Tr. 69-70). In addition, of greater weight is exhibit 12 which indicates there was a 1896 Departmental action cancelling the patent application of Central Pacific for these lands because of their mineral character.

[2] We turn therefore to the issue of whether Birce, appellant Lee's predecessor in interest, can be considered an innocent purchaser for value under section 321(b) of the Transportation Act of 1940, supra. A purchaser will not be considered innocent where the facts

> show that he knew or should have known that the lands were mineral in character as of the date of his purchase or were of such character so as to have been excluded when the railroad line was definitely located or at any time prior to his purchase . . . . As was said in United States v. Central Pacific Railroad Co., 84 Fed. 218, 221 (Cir. Ct., N.D.Cal. 1898): "The status of a bona fide purchaser is made up of three essential elements: (1) a valuable consideration; (2) the absence of notice; and (3) the presence of good faith."

Laden v. Andrus, supra at 490 (quoting from Southern Pacific Co., 1 IBLA 50, 54-5, 77 I.D. 177, 180 (1970)).

The evidence concerning Birce's status as an innocent purchaser centers on the question of notice. Gonzalez concluded in his mineral report at page 20:

> Francis A. Birce was an experienced businessman, and because of the mineral character of the land, he knew or should have known that title to the land was subject to the exceptions set out in the Railroad Grant Act of July 1, 1862. It should have been very evident that the land was mineral in character at the time of the sale because of the presence of extensive mine workings and the presence of mining claims.

At the hearing when asked whether or not Birce knew the land was mineral in character at the time of purchase, Gonzalez stated:

> A. Well he should have known. He should have known.
>
> Q. Why is that?
>
> A. Well Mr. Birce was a businessman, was [a] businessman and he was [a] lumber man, he was no small operator, he was a big operator.
>
> * * * * * * *
>
> A. * * * So this man was a competent businessman and he must have gone out there to see how much timber there was, you know before he purchased from the railroad * * *, he must have seen the mining improvements on it. [2/]

(Tr. 59-61).

There was no evidence presented by the Government to establish that Birce failed to provide valuable consideration for his purchase.

2/ Gonzalez subsequently explained what he meant by mining improvements in the following exchange:

"Q. You speak of mining improvements and you've got me all confused. What do you mean when you say mining improvements?

"A. Well, that cliff, that bluff is a mining improvement, is a mine working, and that's--

"Q. That's what you're referring to when you say mining improvement--

"A. Yeah, mining working, yeah."

(Tr. 73).

On the innocent purchaser issue the Administrative Law Judge concluded:

> Turning now to whether Mr. Birce is an innocent purchaser for value, I find that he should have known that the land was mineral in character. Significantly, other mining claim locations have been made over the subject land. In addition, a railroad patent application for the land was rejected. These things are noted in the BLM records which are public records. These events noted in the records are sufficient to give at least constructive notice to Mr. Birce. See United States v. Central Pacific Ry. 84 Fed. 218, 221 (Cir. Ct., N.D. Cal. 1898). There are other external signs that show that Mr. Birce should have known about the mineral character of the land. The land is located in the center of a gold producing mining district. There are old mineral reports that discussed the gold bearing gravels. Hydraulic mining had taken place on the land which would have left visible signs of mining. Had Mr. Birce examined the BLM records he would have found notations that would have made him aware of the competing interests for the land. Therefore, I find Mr. Birce was not an innocent purchaser for value at the time the land was conveyed to him.

(Decision at 8).

On appeal appellants argue that Birce's status as a "big lumber operator" who purchased thousands of acres of timber establishes that Birce was interested only in the timber, and that "hydraulic mining on adjoining land," a number of years prior to his purchase, should not have put a timber man on notice of mineral character.

The fact that Birce was a large timber operator does not necessarily support appellant's position. While that fact may be supportive of their assertion that he was only interested in the timber, it erodes their position concerning the notice issue. A knowledgeable businessman in 1888 who was involved in substantial land purchases surely would have had reason to know that mineral lands were exempt from the railroad grants. In addition, the evidence indicates that he should have known the mineral character of the land in question.

We must conclude that appellants failed to show by a preponderance of the evidence that one, the land was not mineral in character on the date of purchase in 1888, and two, that Birce was an innocent purchaser for value.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge